

shareholder of HICKS, regarding the accounting services to be performed.

2) Steve Kline will be considered one-half General Manager of WLTA Radio and one-half General Manager of WRBR Radio. Steve will, of course, report to David Hicks regarding anything to do with WRBR Radio.

3) John Dille III will be writing a memo to Steve Kline reminding him that he is reporting to David Hicks on all substantial matters regarding WRBR Radio and they should not be discussed with John.

4) After WRBR invoices are approved by Steve Kline for payment, they are sent to the Business Office. Steve should also, at that same time, forward a copy to David Hicks for approval. Dave need not forward the invoices anywhere; he should merely call Steve if he has a problem with anything Steve had previously approved.

5) We need to obtain a stamp that reads (or have printed on our checks) Hicks Broadcasting of Indiana, L.L.C./dba WRBR Radio so that we can stamp our checks appropriately.

6) No officer or director of Pathfinder or of Truth should be an officer or director of HICKS.

7) HICKS has adopted the same employee benefits as PATHFINDER. Furthermore, since many of the employees of Hicks are already being paid through PATHFINDER because of the JOA agreement, we have decided that all of the employees of HICKS could be on PATHFINDER's payroll. Of course, individuals' wages, payroll taxes, etc., will be charged to HICKS or the JOA accordingly. MMB Ex. 48, p. 2.

63. Campbell viewed Watson's memo as an accurate summary of their conversation.

Tr. 1541. Campbell believed that implementation of the foregoing points would not result in an abdication of control by Hicks over the operations of WRBR(FM). Tr. 1542-9. Basically, Watson consulted with Campbell in order to determine what Pathfinder could and could not do with respect to WRBR(FM) consistent with Hicks/Indiana maintaining control over the station. Tr. 597, 1135-6. Campbell's records do not reflect any contemporaneous discussion with Hicks about Campbell's conversation with Watson. MMB Exs. 44; 54. However, the subject matter of the memo had been discussed previously between Hicks and Dille, and copies of the memo were given to Hicks, Dille and Kline. Tr. 595, 597-601, 1142, 1221-2,

1972-3, 2014, 2086-9, 2094, 2319. Neither the memo nor its contents were disclosed to the Commission. MMB Exs. 4, pp. 6-7; 23, pp. 21-3; Tr. 1540-9, 1580, 2319.

64. In accordance with the first point of the March 4 memo, Watson prepared and submitted to Hicks on March 23, 1994, a proposed agreement which called for Pathfinder to

"perform all accounting functions for [Hicks/Indiana]. This includes general accounting, accounts payable, preparation of payroll checks and proper payment and accounting for related withholding taxes, issuance of financial statements on a monthly basis and filing of required government reports relating to any accounting records for [sic] which we maintain." MMB Ex. 1, p. 81.

According to Hicks, the idea for using Pathfinder developed after he had asked Watson about the availability of accounting services in the South Bend area. Tr. 2158. For the accounting services, Watson proposed a charge of \$705 per month, with the fee being subject to review and revision each January 1. The proposal allowed either party to terminate the agreement upon 60 days' written notice. Hicks signed the agreement that same day.⁹ MMB Ex. 1, p. 81; Tr. 618.

65. Relative to the third point¹⁰ of the March 4 memo, Dille drafted and sent to Steve Kline ("Kline"), the general manager of Pathfinder's WLTA(FM) and the Venture, a letter dated March 17, 1994, advising Kline that he (Dille) did not "want to be involved to any degree in the day-to-day operations of WRBR." Pathfinder Ex. 30; Tr. 352, 2286. The letter further advised Kline that Dille's role relative to WLTA(FM) and to Pathfinder's operations pursuant to the JSA remained unchanged. Pathfinder Ex. 30. Dille sent the letter at Campbell's suggestion to make it clear to Kline that Dille wanted nothing to do with the daily

⁹ By letter dated December 29, 1995, Watson proposed and Hicks accepted that same day an increase in the monthly accounting charge from \$705 to \$1,000. MMB Ex. 1, p. 45.

¹⁰ The second and the fourth through the seventh points of the March 4 memo will be addressed *infra* in the findings of fact pertaining to the operations of WRBR(FM).

operation of WRBR(FM). Tr. 2287.

66. On March 16, 1994, the Commission granted the application to assign the license of WRBR(FM) from Booth American to Hicks/Indiana. MMB Ex. 4, p. 8. On March 31, 1994, Booth American and Hicks/Indiana closed on the sale of the station. MMB Ex. 66; Tr. 688. Hicks executed documents on behalf of Hicks/Indiana. *E.g.*, MMB Exs. 63, p. 3; 66, p. 3. Each Dille child ultimately executed the guaranty. MMB Ex. 74. None of the documents related to the closing, including the Operating Agreement or the Side Letter bears Dille's signature. The closing costs of \$696.88 were covered by a check issued by Pathfinder. MMB Ex. 63. The amount was accounted for as a receivable to Pathfinder and a corresponding payable by Hicks/Indiana. Tr. 658-9.

Hicks/Indiana's Operation of WRBR(FM)

i. Personnel

67. In its application to acquire WRBR(FM), Hicks/Indiana proposed to use less than five full-time employees to operate the station. MMB Exs. 3, p. 21; 4, p. 6. Hicks determined that operation with such a small number of employees was possible if some of the operations of WRBR(FM) were automated, and if the station were to be co-located with WLTA(FM).¹¹ Tr. 1919-20, 2029-30. In the application, Hicks/Indiana also proposed to assume Booth American's role in the JSA, which would result, *inter alia*, in Pathfinder continuing to employ all sales and administrative support personnel. MMB Exs. 1, pp. 15-6; 3, p. 83; 4, p. 8.

¹¹ Indeed, WRBR(FM)'s studios and offices were moved from their location under Booth American to the studios and offices maintained by Pathfinder for WLTA(FM) at 237 Edison Road, Mishawaka, Indiana, sometime between April and June 1994. Thereafter, Hicks/Indiana has been charged 50% of the rent paid by Pathfinder pursuant to an oral agreement. MMB Ex. 4, p. 14; Tr. 607-8, 621, 2121-2.

68. Notwithstanding the JSA's provision that each party was to employ its own management level employees, Hicks and Dille, with Campbell's blessing, approved Kline becoming general manager of WRBR(FM) while continuing as general manager of WLTA(FM) in accordance with the second point of the Watson/Campbell discussion (see ¶ 62, *supra*). MMB Exs. 1, p. 20; 48, p. 2; Tr. 601-4, 1973, 2088, 2287. As of March 1994, Kline was the general manager of WLTA(FM) as well as the general manager of Radio One Marketing of Michiana (the name under which the joint venture between Booth American and Pathfinder operated). Kline had begun to work for Pathfinder at those positions in October 1993. Pathfinder Ex. 70, p. 1; Tr. 268-9. Hicks testified that he considered one other person (Mike Klein) for the position of general manager of WRBR(FM), but he apparently spoke with no one but Kline. Tr. 1970-1. In this regard, however, it is unclear whether, and, if so, when and how often, Hicks and Kline actually discussed Kline's role with respect to WRBR(FM) prior to April 1, 1994. Compare Tr. 271-6 with 443-7 and 609-10. Neither Hicks nor Kline could pinpoint when Kline was actually hired by Hicks; rather, Kline simply understood that he would become WRBR(FM)'s general manager. Tr. 272-4, 410, 1973, 2088-9. The frequency and nature of Kline's communications with Hicks relative to WRBR(FM) prior to the taking of Kline's deposition in Hicks' civil lawsuit against Crystal are also in considerable doubt.¹² Compare, *e.g.*, Tr. 275-8, 443-7 with 354, 359-61.

69. When Kline took on the role of general manager of WRBR(FM) beginning April 1, 1994, his salary did not change. Tr. 603, 2089-90. Instead, Pathfinder became responsible for only 50% of Kline's salary; Hicks/Indiana was charged for the remaining 50% notwithstanding that WLTA(FM) had more employees than WRBR(FM). Compare MMB

¹² In that deposition, Kline testified that he first met Hicks in the summer of 1994 in connection with Dille's vinyl sign business. MMB Ex. 128; Tr. 276-8.

Exs. 69 and 70; Tr. 269-70, 603-4. Dille and Hicks review Kline's performance annually prior to any change in compensation. Tr. 2090-1. Kline has continued as general manager of both WRBR(FM) and WLTA(FM) (now WBYT(FM)) to the time of this proceeding. Tr. 255-8.

70. As noted, the seventh point of the March 4 memo (see ¶ 62, *supra*) read as follows:

7) HICKS has adopted the same employee benefits as PATHFINDER. Furthermore, since many of the employees of Hicks are already being paid through PATHFINDER because of the JOA agreement, we have decided that all of the employees of HICKS could be on PATHFINDER's payroll. Of course, individuals' wages, payroll taxes, etc., will be charged to HICKS or the JOA accordingly. MMB Ex. 48, p. 2.

On March 7, 1994, Watson prepared a "Summary of Employee Benefit Programs" which were applicable to both Pathfinder's WLTA(FM) and Hicks/Indiana's WRBR(FM). The programs covered: payroll policy; doctor and dental appointments; jury duty; holidays; vacations; sick leave pay; funeral leave; auto mileage allowance; health insurance; life insurance and pension plan benefits; and a U.S. Savings Bond program. MMB Ex. 49; Tr. 611. Beginning April 1, 1994, all WRBR(FM) employee paychecks were issued by Pathfinder. Tr. 618-9.

71. On April 1, 1994, Kline hired a news director, a sports announcer and a receptionist for WRBR(FM). MMB Exs. 73, p. 3; 89, p. 1; 92, pp. 1-2. On May 11, 1994, Kline replaced the WRBR(FM) news director with a Pathfinder employee who had been working at WTRC(AM), Elkhart. Dawn Hatfield ("Hatfield"), the new news director now held the position of news director for Pathfinder's WTRC(AM) and WLTA(FM) and for Hicks/Indiana's WRBR(FM). The arrangement and the allocation of her pay among the three stations was agreed to by Kline and Richard Rhodes ("Rhodes"), the general manager of WTRC(AM). MMB Ex. 73, pp. 1-2, 4-6; Tr. 313. Hatfield remained a Pathfinder employee

during her tenure as news director for the three stations, as did her replacement, Thomas Rogers. Tr. 706-6, 713-4, 716-7; MMB Exs. 73, pp. 7-8; 119, p. 3; 120, p. 5; 121, p. 4. A news announcer might work for all three stations (and have their pay allocated among them) or work for two of the three stations. MMB Exs. 87, pp. 1, 3-4; 119, p. 3; 120, p. 5; 121, p. 4.

72. On July 1, 1994, the sports announcer hired by Kline at WRBR(FM) was replaced. Four hours of his time would now be automated; the remaining four hours of his shift were filled by a Pathfinder employee, Vince Turner, who now became the sports director for WTRC(AM), WBYT(FM) and WRBR(FM). MMB Ex. 89, pp. 2-3, 8; Tr. 325. Vince Turner remained a Pathfinder employee during his tenure as sports director for the three stations. Tr. 717, 996-8; MMB Ex. 89, pp. 10-11. On May 9, 1994, WRBR(FM)'s receptionist became a sales assistant for WRBR(FM) and WLTA(FM). She became a Pathfinder employee in accordance with the JSA. Subsequent receptionists and other office staff have been Pathfinder employees, whose salaries were allocated between WRBR(FM) and WBYT(FM). MMB Exs. 1, p. 64; 92, pp. 2-4.

73. WRBR(FM)'s first program director after Hicks/Indiana acquired the license was Bob Henning ("Henning"). Tr. 364, 2123; MMB Ex. 119, p. 3. According to Hicks, Henning served as Hicks' contact with regard to programming and promotions at WRBR(FM). In addition to programming and promotional responsibilities, Henning also performed engineering services. In this regard, Henning had worked as an engineer for WRBR(FM) (and several other stations) while Booth American was licensee. Tr. 2126. On November 29, 1994, Kline informed the staff at WBYT(FM) and WRBR(FM) that Henning had assumed "additional engineering responsibilities with Corporate ... in addition to the facilities' maintenance at 237 Edison." Thereafter, Henning's salary was allocated among three

stations - Pathfinder's WTRC(AM) and WBYT(FM), and Hicks/Indiana's WRBR(FM) - and he was viewed as a Pathfinder employee. MMB Exs. 1, p. 64 (RH, Chief Engineer); 120, p. 5; 121, p. 4; 122, p. 5.

74. At the time of Henning's reassignment, Kline also announced that David Miholer (air name, Phil Britain, hereafter referred to as "Britain" or "Britten") had become program director of both WBYT(FM) and WRBR(FM). MMB Ex. 72, pp. 10-11; Tr. 307. Previously, Britain had been the program director for WBYT(FM). MMB Ex. 72, p. 1. Although Britain's salary was allocated 50% to WBYT(FM) and 50% to WRBR(FM), Kline claimed Britain had "very little involvement in the programming" for WRBR(FM). MMB Ex. 2, p. 15; Tr. 309. In a similar vein, Hicks testified that he bypassed Britain and discussed programming matters with Henning. Tr. 2123-5. In this regard, Hicks indicated that, although he wanted his own program director for WRBR(FM), he tolerated Britain in order to accommodate Kline. Tr. 2125. During his tenure as program director for both stations, Britain remained a Pathfinder employee. MMB Ex. 72, pp. 1-4.

75. In November 1995, Kline promoted Joseph Goldbach (air name, Joe Turner, hereafter referred to as "Turner" or "Joe Turner") to the position of assistant program director of "WBYT/WRBR." MMB Ex. 96, p. 6; Tr. 338. Previously, Turner had been an announcer, first for WBYT(FM) and, later, for WRBR(FM). *Id.*, pp. 1-5; MMB Exs. 119, p. 3; 120, p. 5; Tr. 1386-90. Although Turner's title reflected responsibilities at both stations, his activity was directed primarily toward WRBR(FM) inasmuch as he continued to do that station's morning show and he served as that station's "main link" with the station's program consultant. MMB Ex. 96, p. 6; Pathfinder Ex. 5. Turner continued as assistant program director until Britain's departure in February 1996, at which time Turner became interim program director of both stations. Tr. 339; MMB Ex. 96, p. 8. In March 1996, Turner

became program director solely of WRBR(FM). *Id.*, p. 9. Notwithstanding his job titles, Turner's salary has been allocated 100% to WRBR(FM) since February 1995.¹³ *Id.*, p. 1; MMB Ex. 1, p. 64.

76. Generally, Kline has decided how to allocate responsibilities and salary of non-sales personnel between WBYT(FM) and WRBR(FM). Tr. 303, 305. Thus, in addition to the personnel already noted, Kline divided the salary of the continuity director and the event coordinator equally between WBYT(FM) and WRBR(FM). MMB Exs. 88, pp. 1-2; 95, pp. 1-6. The salary allocation of the operations manager has varied, apparently, according to the amount of time spent by that individual at each station. MMB Exs. 1, p. 64; 91, pp. 1-4.

77. Since Hicks/Indiana's acquisition of WRBR(FM), sales personnel have always been Pathfinder employees and their compensation has been divided between WBYT(FM) and WRBR(FM) in accordance with the JSA. MMB Exs. 1, p. 65; 94, pp. 1-26; 119, p. 3; 120, p. 5; 121, p. 4; 122, p. 4; Pathfinder Ex. 50; Tr. 653-4. As was the case when Booth American was licensee of WRBR(FM), account executives continued to sell the stations jointly following Hicks/Indiana's acquisition of WRBR(FM). However, beginning on July 1, 1995, account executives primarily sold only one station or the other (WBYT(FM) or WRBR(FM)); they no longer sold both unless the client wanted to buy time on both stations. Tr. 293, 327, 330, 333, 2303. Notwithstanding this change in procedures, the compensation of all sales personnel continued to be divided between WRBR(FM) and WBYT(FM) pursuant to the formula prescribed in the JSA. Tr. 653-4. Effective January 1, 1997, the JSA was amended. From that time on, the compensation of sales personnel has been allocated either to

¹³ For EEO reporting purposes, Turner was viewed as a Pathfinder employee in 1994, but a Hicks/Indiana employee subsequently. MMB Exs. 1, p. 64; 119, p. 3; 120, p. 5; 121, p. 5; 122, p. 6

WBYT(FM) or to WRBR(FM) exclusively, depending on which station's air time the individual sold. MMB Exs. 1, pp. 64-5; 94; 100, p. 5; Pathfinder Ex. 50. The compensation of the general sales manager has always been divided equally between the stations, except for a brief period in the latter part of 1996, in accordance with the JSA. MMB Exs. 1, pp. 64-5; 93, pp. 1-5; 100, p. 5; Hicks/Indiana Ex. 11.

78. When Hicks/Indiana acquired the license for WRBR(FM), Hicks was employed by Crystal at its stations in the Kalamazoo, Michigan area. He held the titles of Chairman, Executive Vice President and Director of Sales. MMB Ex. 23, p. 15. His compensation was more than \$100,000 per year, and, operationally, he was in charge of the stations' sales. *Id.*, p. 14; Tr. 93-4, 1856, 1941.

79. Pursuant to a recommendation from communications counsel retained separately by Crystal, the Crystal board, on July 15, 1994, removed Hicks as Chairman and Treasurer due, in part, to questions concerning the propriety of the acquisition and operation of WRBR(FM) by Hicks/Indiana. In addition, Crystal's board voted to place Hicks on unpaid administrative leave pending further investigation of his relationship with WRBR(FM) and other allegations.¹⁴ Tr. 129-32, 236. He no longer received a salary but continued to receive insurance coverage until Crystal terminated that in December 1994. MMB Ex. 90, p. 3; Tr. 1857. Hicks never again worked for Crystal. Tr. 1858-9.

80. On September 1, 1994, Dille hired Hicks to oversee the opening of stores which would make and sell vinyl signs. MMB Ex. 1, pp. 66, 96; Tr. 790, 2274. Eventually, stores,

¹⁴ In December 1994, Hicks filed a civil suit against Crystal (Case No. B94-3603-NZ, Circuit Court for the County of Kalamazoo, Michigan). On August 5, 1996, summary judgment was entered in favor of Hicks "on the core issue of the unlawful removal of a forced sale clause by Crystal from a shareholder agreement to which Hicks was a party." Pathfinder Ex. 48. On August 8, 1997, Hicks and Crystal settled their litigation. Pathfinder Ex. 53; Tr. 133.

operating under the name "Sign Pro," were opened in Elkhart (autumn 1994), Grand Rapids, Michigan (late 1994/early 1995), and Fort Wayne, Indiana (1995). MMB Ex. 3, p. 180; Tr. 795-6, 2139-41. In this regard, Hicks met Flint Dille for the first time sometime in August 1994, in connection with an interview for the position of general manager for the Elkhart Sign Pro store. MMB Ex. 3, p. 181. Dille paid Hicks \$20,000 (based on a \$60,000 annual salary) for Hicks' services with regard to Sign Pro for the four months covering September through December, 1994. MMB Exs. 4, p. 13; 90, p. 4. During this period, Hicks visited WRBR(FM) and spoke with Kline and/or Henning during the visits or by telephone. He also received weekly sales reports, monthly financial statements and miscellaneous invoices. MMB Ex. 110; Tr. 354, 359-60, 2123, 2138. None of the salary Hicks received from Pathfinder was allocated to WRBR(FM). Tr. 794-5.

81. On January 1, 1995, Dille assigned Hicks the additional responsibility of increasing national sales for some, but not all, of the radio stations operated by Pathfinder and Truth. Tr. 2275. From January 1, 1995, to July 1, 1995, Hicks' salary, now \$70,000 per year, was allocated among Sign Pro and eight radio stations, one of which was WRBR(FM). MMB Exs. 4, p. 13; 90, p. 5; Tr. 795-7. On July 1, 1995, Hicks, at no change in salary, became the general manager of Pathfinder stations, WCUZ(AM/FM), Grand Rapids and WAKX(FM), Holland, Michigan. Tr. 818-9. Hicks continued as general manager of WAKX(FM), following the sale of WCUZ(AM/FM) in 1996, until March 1, 1997. MMB Ex. 1, p. 66. While he was general manager of Pathfinder's Grand Rapids area stations, Hicks continued to visit WRBR(FM) periodically, maintain telephone contact with Kline, Henning, and, later, Turner, and review station reports and invoices. Tr. 354-5, 360-1, 1394, 1413-4, 2123-5, 2140-3, 2147-8.

82. By memo dated November 14, 1995, Watson informed Pathfinder's payroll clerk

that, effective November 1, 1995, \$3,000 of Hicks' salary was to be charged to WRBR(FM). The remaining compensation was to be charged to WCUZ-FM. In addition, Watson informed the clerk that he had reclassified \$30,000 of Hicks' 1995 salary to the WRBR(FM) account. MMB 90, p. 11. Watson did not recall why he made such an allocation but he believed it followed a conversation with Hicks. Tr. 802-6. Likewise, Hicks testified that the allocation had been discussed with Watson although Hicks acknowledged that he spent far more time at Grand Rapids than at South Bend. Tr. 2145-9. By memo dated May 1, 1996, Watson directed Pathfinder's payroll clerk to charge 50% of Hicks' salary to WAKX(FM) and 50% to WCUZ-FM; however, Pathfinder would continue to make a standard journal entry transferring \$3,000 per month from the WAKX(FM) account to the WRBR(FM) account. MMB Ex. 90, p. 13; Tr. 817-8. By memo dated August 30, 1996, Watson informed Pathfinder's payroll clerk that, effective July 1, 1996, Hicks's compensation should be allocated solely to WAKX(FM), except for the \$3,000 per month which should continue to be charged to WRBR(FM). MMB Ex. 90, p. 15; Tr. 820-1. Consequently, between January 1, 1995 and March 1, 1997, slightly more than 51% of Hicks' salary was allocated to WRBR(FM). MMB Ex. 1, p. 66. Since March 1, 1997, all of Hicks' compensation has been charged to WRBR(FM). Hicks' salary has remained at \$70,000 per year. MMB Ex. 90, p. 17.

83. As of April 1, 1997, when Hicks/Indiana and Pathfinder responded to a letter of inquiry ("LOI") from the FCC's staff,¹⁵ the compensation of nine persons was allocated exclusively to WRBR(FM). Those individuals included Hicks, Joe Turner, five announcers, a

¹⁵ The LOI had followed Niles' October 29, 1996, informal objection which contended, *inter alia*, that Pathfinder controlled Hicks/Indiana. Niles' informal objection was supported in large measure by December 1995 and January 1996 deposition testimony of Hicks, Dille, Kline, Watson and Flint Dille, which focused on their roles in Hicks/Indiana's acquisition and operation of WRBR(FM). *E.g.*, MMB Exs. 1, p. 11; 2, p. 20; 3, p. 9; 4, pp. 15-16.

board operator, and a person involved in promotions. MMB Exs. 1, p. 64; 90; 96. The compensation of the general manager (Kline), WRBR's Operations Manager (Hull), the employee in charge of Production/Continuity (Poepppe), the Event Coordinator (Tiedemann), the General Sales Manager (Williams), and the Office Manager/Traffic Director were split evenly between WBYT(FM) and WRBR(FM). MMB Exs. 1, p. 64; 88; 91, p. 1; 93, pp. 2-5; 95, pp. 1-3. The compensation of the Chief Engineer (Henning) and the Sports Director (Vince Turner) were split among WTRC(AM), WBYT(FM) and WRBR(FM). MMB Exs. 1, p. 64; 89, pp. 3, 8. The record is not clear as to whether and, if so, to what extent, there was a split in the allocation of the compensation of the News Director. MMB Ex. 73, pp. 4-9. Finally, the compensation of the five persons who sold air time for only WRBR(FM) was allocated to Hicks/Indiana pursuant to the amended JSA. MMB Exs. 1, p. 64; 94, pp. 5-7, 17-19.

ii. Programming

84. Under Booth American, WRBR(FM)'s entertainment programming was "oldies." Tr. 1974. Following the acquisition of the station by Hicks/Indiana, the oldies format was continued. Tr. 351, 1975. Hicks signed the music license agreements following their transmission to him by Watson and forwarded them to the appropriate parties with cover letters prepared by Watson. MMB Ex. 86; Pathfinder Exs. 37; 40; Tr. 769-70, 2015-6. WRBR(FM) continued to use an oldies format until March 1996, when the format was changed to "active rock."¹⁶ Tr. 287-8. Hicks made the decision to change the format after receiving input from Kline, Turner and Tim Moore ("Moore") of the Audience Development Group. Tr. 1395-6; 1402-3, 1977.

¹⁶ Kline, with Dille's approval, had changed the format of WLTA(FM) to country and changed the station's call sign to WBYT(FM) in June 1994. Tr. 285.

85. By letter dated January 24, 1994, Kline, in his capacity as general manager of Radio One Marketing of Michiana, advised Booth of his intention to use Moore as a consultant for the programming of both WLTA(FM) and WRBR(FM). Pathfinder Ex. 1; Tr. 379-80. Two days later, Booth informed Kline that he concurred with the use of Moore and asked Kline to have Moore contact Ford (then WRBR(FM)'s general manager) to coordinate plans for Moore's visit. Pathfinder Ex. 2; Tr. 380-2. The advice received was to continue with oldies. Tr. 351. Following Hicks/Indiana's acquisition of WRBR(FM), Kline continued to use Moore as a programming consultant for WRBR(FM). MMB Ex. 118, pp. 1-2, 4-5, 7. According to Moore, he persuaded Hicks to continue the oldies format, notwithstanding Hicks' misgivings about the wisdom of doing so. Tr. 1463-4. Prior to the format change in 1996, Moore visited WRBR(FM) approximately four or five times a year. Moore testified that Hicks was there "most of the time." Tr. 1470-1.

86. In mid-January 1996, Moore sent a memo to "Steve Kline, Dave Hicks -- Federated Media." In this regard, Moore testified that, contrary to the inference one could draw from the way the memo was addressed, he did not view Hicks/Indiana as a part of Federated Media. As to why he sent a copy of the memo to "Federated Media," Moore explained that he sent the document to Dille "as a passive sales tool." Tr. 1489-90. The memo focused on WRBR(FM)'s (then known as KOOL 104) performance in the fall of 1995 and possible approaches to attain audience growth. Essentially, Moore recommended increased marketing and promotion, a change in the morning show, and, possibly, a change in format. Pathfinder Ex. 3; Tr. 390-1, 1491-3. According to Moore, Dille called immediately and said: "'Don't waste your memos on me. I don't have anything to do with the station, and I really shouldn't be receiving them.'" Tr. 1489.

87. Shortly thereafter, Moore sent a second memo, this one directed to Kline, Joe

Turner and Hicks. This memo observed that:

"WRBR has been a sub-optimized product. We've assumed that while the station's Oldies position is viable as a compliment [sic] to B-100, it cannot be expected to achieve the total persons tonnage to challenge for the market's top 3 ranking. Market cluster composition, SUNNY 101's prominence and the slowly aging narrow target of Oldies are factors in the projection of KOOL 104's future limitations."

Moore recommended that WRBR(FM) change its format to "active rock," attack two of its competitors, WAOR (licensed to Niles) and WZOW, and change its image from KOOL 104 to the "BEAR." Pathfinder Ex. 5; Tr. 394-5, 1494-7. In conjunction with this recommended change, Hicks negotiated for and ultimately acquired the rights to the "The Bob and Tom Show," a syndicated program originating in Indianapolis, which became WRBR(FM)'s new morning show.¹⁷ Hicks Ex. 8; Tr. 1978-84. On March 17, 1996, the format of WRBR(FM) was changed from oldies to active rock. Tr. 287. Prior to the format change, Turner acknowledged that he had little or no interaction with Hicks; subsequent to the change, Turner testified that he has contact with Hicks at least weekly. Tr. 1413-4.

88. From the time of the acquisition of the station by Hicks/Indiana to the present, WRBR(FM) has obtained news and public affairs programming from Pathfinder. In this regard, since May 11, 1994, the news director has been a Pathfinder employee and the news broadcasts are edited and delivered by Pathfinder employees. Tr. 279-81, 2131. See also, ¶ 71, *supra*. Likewise, the public affairs programs are moderated by Pathfinder employees, and the programs themselves are usually broadcast both on WRBR(FM) and WBYT(FM). MMB Ex. 4, pp. 15-16; Tr. 281-3, 2131-2. With respect to news programming, the principal

¹⁷ The Dille children covered the \$75,000 fee paid to acquire the rights to "The Bob and Tom Show." MMB Exs. 1, p. 59, n. 6; 104, pp. 6-8; 105, pp. 4-5; Tr. 878-9, 2328. Each had recently received a check from Hicks/Indiana for more than \$42,000, which represented a return of money loaned to Hicks/Indiana in order to, *inter alia*, make the \$105,000 payment to Booth American. MMB Exs. 102, pp. 35-38; 104, pp. 2-3; 105, p. 3; Tr. 874-5, 2328.

difference between Pathfinder's WBYT(FM) and Hicks/Indiana's WRBR(FM) is that the latter features national news discussions and presentations during its morning show, "The Bob and Tom Show," and thus its news breaks during the morning show are focused more on local news. Tr. 1406-9.

iii. Finances

89. Hicks/Indiana's financial certification was based on Hicks' ability to sustain the operations of WRBR(FM) for three months from his personal assets. Tr. 1918, 2101-2. Hicks further believed that Hicks/Indiana could meet its obligations to Booth American from funds derived through the operations of WRBR(FM). Tr. 1904. In this regard, Hicks understood that WRBR(FM) would derive revenues primarily through the JSA, which Hicks/Indiana was to assume from Booth American upon becoming licensee. MMB Ex. 3, p. 83; Tr. 2094-7. As events unfolded, however, Hicks was not called upon (and did not volunteer) to cover initial operations, and station revenues were insufficient to pay the amounts due on the note to Booth American.

90. As discussed above (see ¶ 7, *supra*), the JSA charged Pathfinder with the tasks of accounting for the Venture's revenue and expenses and paying sales expenses. However, if expenses exceeded revenues by more than \$5,000 in any month, the JSA called for Booth American, and, once it became licensee, Hicks/Indiana, to reimburse Pathfinder for the excess. Conversely, if revenues exceeded expenses for any given month, the JSA prescribed that Pathfinder disburse the excess to Booth American, later, Hicks/Indiana, by the 55th and 70th days following the month in question. MMB Ex. 1, p. 18. The JSA did not provide for payments of interest by either party. Tr. 1061. While Booth American was licensee of WRBR(FM), Pathfinder disbursed funds to Booth American in accordance with the JSA. Tr. 489-92, 1062-3.

91. As a consequence of the Hicks/Indiana - Pathfinder accounting agreement, Pathfinder undertook to perform all accounting functions for Hicks/Indiana, not just those arising through the JSA. MMB Ex. 1, p. 81; Pathfinder Ex. 78; Tr. 1013, 1143-4, 1163, 2159-60. Although not specified in either the JSA or the accounting agreement, Hicks and Watson, with Campbell's blessing, understood that all of Hicks/Indiana's bills would be paid from an account maintained and controlled by Pathfinder. Tr. 1140-2, 1166, 1545-6, 2014. In this regard, for bills relating solely to WRBR(FM) operations, the Pathfinder check was to and did in most instances reflect that it was a payment from Hicks/Indiana. MMB Exs. 48, p. 2; 63, p. 4; 106; Tr. 903-4. In addition, all invoices related solely to WRBR(FM) were supposed to be sent to Hicks for his approval. Tr. 1139. But see, *e.g.*, MMB Exs. 118; 126 and Tr. 982-9, 1996. In any event, regardless of whether a Pathfinder check correctly identified, or mistakenly failed to reflect, that it was a payment from Hicks/Indiana, the books of both Pathfinder and Hicks/Indiana properly attributed the expense to Hicks/Indiana. Tr. 658-9, 698-9. Since May 1994, Hicks has received a copy of the monthly general ledger and financial statement for WRBR(FM). Tr. 1159-60, 1993-4.

92. For the period April 1, 1994 to September 1, 1996, sales expenses and revenues were evenly divided between Pathfinder and Hicks/Indiana in accordance with the JSA. For the period September 1, 1996 to January 1, 1997, revenues and expenses were divided 60% to Pathfinder and 40% to Hicks/Indiana because of WBYT(FM)'s higher ratings during the applicable rating period in accordance with the JSA. Pathfinder Ex. 49; Hicks Ex. 11; Tr. 1200-3, 1211-2. Since January 1, 1997, in accordance with the amendment to the JSA, revenues and expenses have been divided in accordance with the actual sales of time for each station, Pathfinder's WBYT(FM) and Hicks/Indiana's WRBR(FM). Pathfinder Ex. 50; MMB Exs. 1, p. 65; 100, p. 5. Hicks receives a weekly sales report. Tr. 354, 1993-4.

93. Prior to the establishment of a separate bank account for Hicks/Indiana in April 1997 (MMB Ex. 4, p. 10), all funds belonging to Hicks/Indiana resided in a Pathfinder checking account. Tr. 1171-3. Indeed, during this period, Hicks/Indiana did not have a bank account. Tr. 1164. From April 1, 1994 to April 1997, when those funds (other than those designated to pay Booth American, discussed at ¶ 99, *infra*, or used to pay the rights to the "Bob and Tom Show," discussed at n. 13, *supra*) were insufficient to cover WRBR(FM)'s expenses, Pathfinder simply paid the bill and treated the amount advanced as a receivable from Hicks/Indiana. Tr. 681, 1163-70. As with other receivables, Pathfinder did not charge interest for any funds advanced to Hicks/Indiana. Tr. 761, 1235-6. Thus, for the periods June 1994 through March 1995, and January through May 1996, Pathfinder (and/or Truth) funded Hicks/Indiana's negative cash flows. MMB Exs. 112, pp. 7-27; 113, pp. 1-9; 114, pp. 1-15; Tr. 758-61, 835-6, 841-7. The largest amount Hicks/Indiana ever owed to Pathfinder and Truth was approximately \$80,000. Tr. 1177. Accordingly, irrespective of whether expenses exceeded revenues by more than \$5,000 in any month, Pathfinder never sought and Hicks/Indiana never tendered reimbursement in accordance with the JSA. Tr. 679-84. However, beginning April 1997, if Hicks were to owe Pathfinder money, it would have to be paid within 30 days. Tr. 1177; MMB Ex. 1, p. 60, n. 11.

94. Conversely, during the period April 1, 1994 to April 1997, any funds belonging to Hicks/Indiana remained in Pathfinder's account. Tr. 683. Money from that account was swept regularly into an interest-bearing account of Pathfinder; however, Pathfinder has never paid any interest earned from money to Hicks/Indiana. Tr. 761, 1224. In this regard, the handling of funds jointly generated by WBYT(FM) and WRBR(FM) was similar to the treatment accorded other Pathfinder stations which operate jointly. Tr. 761-3. The largest amount Pathfinder and Truth owed to Hicks/Indiana was approximately \$175,000. Tr. 1177.

All funds payable to Hicks/Indiana were handled by Pathfinder personnel and deposited into the Pathfinder checking account. MMB Exs. 76; 102, pp. 4, 10, 15, 17, 19, 21, 24, 28-30, 38; 103, p. 6; 104, pp. 6, 12; 109; Tr. 723-5, 853-6. Watson acknowledged that, prior to January 1, 1997, disbursements of the Venture's revenue were not made in accordance with the JSA. Tr. 679-84. However, pursuant to an amendment to the JSA effective January 1, 1997, revenue has been disbursed twice in a 30 day period, with the first payment occurring in March 1997. Tr. 683, 1172; Pathfinder Ex. 50. The amendment has been strictly followed thereafter. Tr. 1177.

95. Dille has received Hicks/Indiana financial statements. Tr. 2281. In December 1994, Dille knew about and discussed with Watson the amounts owed by Hicks/Indiana to Pathfinder and Truth. Dille acknowledged the amount was "becoming significant." Tr. 2282-3. Rather than try to collect money from Hicks/Indiana, Dille chose to wait, and, eventually, WRBR(FM) was "in the clear." Tr. 2284. Dille recognized that Hicks/Indiana was not like an advertiser since he knew Pathfinder would get what it was owed. Tr. 2323-4. In any event, Dille never thought of the Hicks/Indiana receivable as a form of financing the WRBR(FM) acquisition or as inconsistent with his February 1994 representation to the Commission. Tr. 2284-5.

96. When Hicks/Indiana became licensee of WRBR(FM), the members' capital contributions totalled \$1,000 -- \$510 from Hicks and \$490 from the Dille children -- in accordance with the Side Letter. MMB Ex. 61. Hicks' contribution was the cost of his letter of credit from the Michigan National Bank. MMB Ex. 3, p. 77; Hicks Ex. 6, p. 2; Tr. 1194-5. The Dille children's capital contribution was derived from the cash portion of the escrow, all of which was sent directly by Booth American's counsel to Watson. Watson treated the remainder of the funds initially provided by Dille children, approximately \$24,000, as loans to

Hicks/Indiana. MMB Exs. 76; 105, pp. 1, 3; 112, p. 1; Tr. 723-5. Eventually, Watson prepared and Hicks signed promissory notes to repay to each of the Dille children \$8,000, which represented the difference between the escrow funds returned to Hicks/Indiana and the amounts of their respective capital contributions. MMB Ex. 104, p. 1; Tr. 871-3. Subsequent loans from the members to Hicks/Indiana have been evidenced by promissory notes contemporaneously prepared by Watson and signed by Hicks. MMB Exs. 103, pp. 1, 4, 7, 9-10, 13; 104, pp. 4-5, 8, 10-11, 13, 15-6; Tr. 875-7, 895-7.

97. Sometime during the months of April, May and June, 1994, Kline, Watson, and, eventually, Hicks discussed a budget for WRBR(FM) for the 1994 calendar year. Tr. 773-6. The budget was finalized on June 15, 1994 and transmitted to Hicks by letter dated June 22, 1994. Hicks Exs. 13; 14; MMB Ex. 108; Tr. 770-2, 1204. Kline, Watson and Hicks testified that subsequent annual budgets for WRBR(FM) have been prepared during the autumn preceding the year at issue. Tr. 401-3, 1213-5, 1985-7. Hicks testified that Kline and Watson are involved in assembling the information for the budget, but that he has made the final decision regarding the amounts to be spent and that he reviews each line of the budget. Tr. 1985-7. With respect to WRBR(FM), Dille has never participated in the budget process, suggested an expenditure, or vetoed a capital expenditure. Tr. 408.

98. The 1994 budget for WRBR(FM) anticipated that the station would have a positive cash flow for all months except May. Hicks Ex. 13, p. 1. However, as reflected in the station's financial statements, WRBR(FM)'s operating cash flow dropped from a positive \$3,585 in April 1994 to a negative \$52,570 by the end of the year. MMB Ex. 112. Indeed, the only positive cash flow months for 1994 were April, August and December. *Id.*, pp. 3, 15, 27. Hicks/Indiana did not fund the losses via contributions or loans from its members; rather, Pathfinder simply continued to pay Hicks/Indiana's bills and the amounts contributed

were reflected on Hicks/Indiana's balance statement as a payable to Pathfinder and/or to Truth. *E.g., id.*, p. 20. By the end of 1994, Hicks/Indiana's net operating loss was over \$160,000. *Id.*, p. 27. The same financial statement shows that Hicks/Indiana owed Truth \$11,370 and Pathfinder \$52,219. *Id.*, p. 26; Tr. 844-5.

99. The financial difficulties in 1994 also affected how the note to Booth American was paid. By memos sent during the period September 1994 through March 1995, Watson informed the Dille children that Dille was making a gift (or a loan) to each of them in the form of the enclosed check. The Dille children were directed to deposit their father's check in their individual checking accounts and then send a personal check to Watson. Watson thereupon deposited the checks of the Dille children for the benefit of Hicks/Indiana in Pathfinder's account and paid the amount due to Booth American. MMB Ex. 102, pp. 1-5, 7-10, 12-15, 18-22, 25-30, 32-38; Tr. 830-2, 838-45. Between September 1994 and April 1995, Dille was the source for all funds, which totalled nearly \$120,000, contributed by the Dille children. MMB Ex. 1, pp. 52-3; Tr. 838-9, 901. Dille was also the source of funds contributed by the Dille children for the Hicks/Indiana payments made to Booth American that were due on May 1 and June 1, 1996. MMB Exs. 1, p. 89; 102, pp. 39-41; Tr. 851-2, 901. Hicks did not receive copies of Watson's memos to the Dille children, and he did not know about any of the transactions involving Dille and his children. Tr. 2006-7.

100. Between September 1994 and February 1995, Watson also sent reminder memos to Hicks. Hicks, in turn, would send a personal check to Watson, who deposited the check for the benefit of Hicks/Indiana in Pathfinder's account. MMB Ex. 102, pp. 4-6, 10-11, 16-17, 23-24, 31; Tr. 836-7, 840-2. For several of the \$5,000 payments due Booth American, however, Hicks did not have sufficient funds to pay the amount of his share. To allow Hicks to make the payment, Pathfinder in early 1995 sent Hicks "extra compensation," which he

then used to pay his portion of the money due Booth American.¹⁸ MMB Ex. 90, pp. 6, 9-10; Tr. 809-11. Moreover, Hicks made no contributions toward the \$105,000 payment made to Booth American on March 22, 1995 or the \$10,000 payment made to Booth American on April 24, 1996. However, Hicks did contribute the entire \$10,000 amount paid to Booth American on March 27, 1996 as well as his pro rata share toward the \$10,000 payment made on May 22, 1996. MMB Ex. 1, p. 89. Between June 1996 and December 1997, funds for note payments were derived from station operations. MMB Ex. 1, p. 58. Finally, Hicks secured from Old Kent Bank a line of credit which enabled Hicks/Indiana to make the final balloon payment due Booth American on January 1, 1998. MMB Ex. 100, pp. 10-17; Tr. 962-3, 2010-4.

101. Initially, Pathfinder's accounting department treated the money provided by the Dille children and Hicks to pay Booth American as contributions to capital. MMB Exs. 102, pp. 1-3; 112, pp. 20, 23, 26. However, Watson ultimately suggested and Hicks agreed that the amounts should be treated as loans to Hicks/Indiana. Tr. 830-4. These loans were usually memorialized in the form of promissory notes prepared by Watson and signed by Hicks. Initially, the loans were repaid at the instigation of Watson by Hicks/Indiana when it had the cash balance to do so. MMB Exs. 103, p. 1; 104, pp. 2-5; Tr. 901-2. However, at the first meeting of the members of Hicks/Indiana on December 23, 1996, the members agreed that there should be no repayment of loans in order to have sufficient cash to meet the company's obligations. MMB Ex. 100, p. 4.

¹⁸ According to Hicks, Dille and Watson, the April 3, 1997, LOI response contained an inadvertent error. Specifically, the response should have noted that Pathfinder was the source of some of the money paid by Hicks to cover his share of the payments made to Booth American. In this regard, the three forgot that Pathfinder had paid Hicks "extra compensation" to allow him to contribute his pro rata share of the payment due Booth American. Tr. 812-5, 1963-5, 2276-7.

102. On April 22, 1997, Hicks/Indiana opened a bank account. MMB Ex. 4, p. 10. Funds from that account are used to repay Hicks/Indiana's line of credit and attorneys fees. Most of Hicks/Indiana's payables, however, are still made from Pathfinder's account. Tr. 904-5. WRBR(FM)'s revenue for 1997 was \$1,542,000. As of May 29, 1998, the station's bookings for 1998 exceeded \$1.1 million. MMB Ex. 100, p. 22. Pathfinder's annual gross revenue is approximately \$12 million. Tr. 1046.

iv. Miscellaneous Matters

Legal bills/services

103. Brown's April 29, 1994 invoice regarding Hicks/Indiana was sent directly to Hicks. MMB Ex. 18. Copies were sent to both Watson and Dille. MMB Exs. 80; 81; 82; Tr. 509-10. The invoice, which totalled \$22,804.58, covered services Brown provided between September 6, 1993 and April 26, 1994. Virtually all of the services noted were provided by Brown and the members of his firm to Hicks in his capacity as agent for Hicks/Indiana or to Hicks/Indiana. MMB Ex. 18. By letter dated May 2, 1994, to Dille, copies to Watson and Hicks, Brown advised that he was reducing the firm's normal charges by 10%. MMB Ex. 82. By letter dated November 7, 1994, to Dille, copy to Hicks, Brown confirmed that, pursuant to their conversation, the firm's invoice to Hicks/Indiana would be reduced to \$15,759.08 provided that payment was made in full on or before December 15, 1994. MMB Ex. 107, p. 1; Tr. 1745-6. Dille negotiated the reduction in the fee because Hicks was uncomfortable doing so in light of his relationship with Brown. Tr. 2078-80. Watson made the payment on behalf of Hicks/Indiana. MMB Ex. 107, p. 2; Tr. 510.

104. Campbell's invoices to Hicks/Indiana have been sent directly to Hicks. Hicks, in turn, has forwarded the invoices to Watson, who would authorize payment. Tr. 560-1. In this regard, none of the invoices from attorneys would be paid unless Watson approved. Tr.

499, 530, 560-1, 565, 572, 574-5, 586-7, 626. Some of the invoices reflect that Hicks reviewed the invoice and determined that payment should be made. MMB Ex. 126, pp. 3-5, 11-31. Others do not indicate whether Hicks reviewed the bill. MMB Exs. 39; 42; 44; 126, pp. 1-2, 6-10; Pathfinder Exs. 41; 42. However, even with respect to invoices that Hicks approved, Pathfinder did not always pay the entire amount authorized by Hicks. MMB Ex. 126, pp. 17, 21, 23, 25.

105. The Barnes & Thornburg invoices pertain to services rendered between February 24 and March 31, 1994. MMB Exs. 45; 46. As discussed (see ¶¶ 56-9, *supra*), those services resulted in the preparation of the organizational documents for Hicks/Indiana, including the Articles of Organization and the Operating Agreement. The invoices were sent to Watson who determined when they should be paid. MMB Exs. 45; 46; Tr. 591-2.

Insurance

106. By letter dated March 31, 1994, Watson informed Pathfinder's insurance agent that WRBR(FM) radio "should have similar coverages as do our other radio stations and companies." MMB Ex. 67; Tr. 690. Ultimately, WRBR(FM) was included on Pathfinder insurance policies covering motor vehicles, real property and equipment, workers compensation and communications liability. MMB Ex. 101, pp. 1-10, 18-32; Tr. 922-34, 945-7. Hicks/Indiana has been charged for its share of insurance premiums paid by Pathfinder, and the charges are reflected in Hicks/Indiana's budgets. Hicks Ex. 13.

Accountant

107. Hicks/Indiana used the same outside accounting service, McGladrey & Pullen, LLP ("McGladrey"), as did Pathfinder. Hicks/Indiana employed McGladrey only for the purpose of preparing tax returns; Pathfinder also uses McGladrey to audit its books. Tr. 750-1, 907-8 The invoices from McGladrey were sent to Hicks/Indiana at Pathfinder's post office

box in Elkhart. Tr. 909. Prior to January 1997, the invoices indicate that the only persons who saw them were Pathfinder personnel. Beginning in January 1997, some of the invoices reflect Hicks' acquiescence or approval. MMB Ex. 117; Tr. 915.

Hicks/Indiana files/records

108. Hicks/Indiana files and records have been in the custody of a variety of persons. Initially, pertinent records such as the APA and all its schedules were sent to Hicks, Brown, Dille, Watson and Campbell. MMB Ex. 35; Tr. 533. Following the closing, the entire set of documents was sent by Brown to Watson. MMB Ex. 81; Tr. 739. Watson later set up and maintained the minute book for Hicks/Indiana. MMB Ex. 85; Tr. 764. Watson has also forwarded music licensing agreements to Hicks and prepared appropriate letters for Hicks' signature. MMB Ex. 86; Tr. 769-70. As previously noted, Watson sent reminder memos to Hicks and the Dille children and prepared promissory notes as well as the checks used to pay off the notes (see ¶¶ 99-101, *supra*) while Pathfinder employees have prepared and occasionally executed forms for WRBR(FM) which were filed at the Commission. MMB Exs. 99, pp. 1-6; 125. Finally, Watson has served as the scribe and keeper of the minutes of Hicks/Indiana's members' meetings. MMB Ex. 100; Tr. 959-60.

Monitoring Station Affairs

109. As noted, Kline, Watson and Hicks testified that weekly sales reports and monthly financial statements for WRBR(FM) are sent to and reviewed by Hicks. In this regard, by letter dated July 25, 1995, Hicks congratulated Kline "on a money making June for WRBR." In addition, Hicks had questions about line items for the Associated Press ("AP"), the rent, and the telephone. With respect to the AP item, Hicks commented that he hoped the station was nearing the end of the expense, while for the rent, he inquired how the figure was arrived at and that the station had received a sizeable increase over the previous year. MMB

Ex. 110. The June 1995 financial statement showed that the station had a positive operating cash flow for the month of \$25,995. MMB Ex. 113, p. 17 (column heading: "This Mo. Actual"). In addition, the statement showed that the station's rent was only \$57 over budget and some \$500 less than the amount budgeted in 1994. Compare MMB Ex. 113, p. 17, with Hicks Ex. 13, p. 1. Hicks believed he was questioning why the rent was not consistent. Tr. 2120. Moreover, even though he understood that the rent was based on an even split with Pathfinder, he was questioning whether Hicks/Indiana was on the "short side" of the deal. Tr. 2121. With respect to the AP expense, the 1994 budget reflects a monthly budget expense for the AP news wire of \$675 to \$845. Hicks Ex. 13, p. 13. Hicks explained his concern was based on the premise that he was nearing the end of the contract, and he was hoping to reduce or eliminate the expense soon. Tr. 2117.

110. Generally, any questions regarding station operations are now discussed by Hicks and Kline during Hicks' visits to the station or during telephone conversations. Hicks also discusses programming with Joe Turner. Tr. 1988-93, 2007-9. Hicks also now keeps track of station affairs via email. *E.g.*, MMB Ex. 111. Kline reviews monthly financial statements with Hicks. Tr. 359-60. The frequency of Hicks' visits to WRBR(FM) varied depending on his responsibilities to Sign Pro, Pathfinder's national sales and Pathfinder's Grand Rapids properties. Tr. 2138-43.

111. Beginning in late 1996, Hicks has convened meetings of the members of Hicks/Indiana to review and discuss formally the affairs of WRBR(FM). Tr. 960-1. At least three such meetings have occurred on: December 23, 1996; August 20, 1997; and May 28, 1998. MMB Ex. 100, pp. 3-7, 10-17, 20-24. At such meetings, the members of Hicks/Indiana (Hicks and the Dille children) have reviewed station operations with Watson, Kline and Williams (the WBYT(FM)/WRBR(FM) sales manager) and approved or vetoed

capital expenditures. As late as their most recent meeting, the members discussed, *inter alia*, whether WRBR(FM) is receiving the same amount of "hype" as WBYT(FM), whether WRBR(FM) is still "looked at as a "stepchild" in the building [shared with WBYT(FM)]," and whether their sales people were as good as those of WBYT(FM). MMB Ex. 100, p. 21. However, it was also noted that Hicks/Indiana had two new rental agreements for use of space on WRBR(FM)'s tower and that a load study was being performed to determine whether additional space could be rented. *Id.*, p. 22.

Character Testimony

112. Edward K. Christian ("Christian") testified as a character witness on behalf of Hicks. At present, Christian is president and chief executive officer of Saga Communications ("Saga"). Tr. 2168. Saga operates in twelve broadcast markets with 37 radio stations and one television station. Tr. 2169. Christian started working in radio as a teenager and has known Hicks for approximately 35 years. Tr. 2172.

113. Christian recommended Hicks to the owner of two radio stations in Battle Creek, Michigan; the owner ultimately hired Hicks as the general manager of the stations. Tr. 2174-6. When the owner of the stations offered to sell them to Hicks, Christian assisted Hicks in obtaining the necessary financing by introducing him to executives at a bank and to another investor. Tr. 2176-7. Christian indicated that his assistance was a measure of his confidence in Hicks. Christian assisted Hicks because he believed Hicks had the character and ability to own the stations, and that Christian would not have done so for just anybody because it could reflect badly on him. Tr. 2177-8.

114. Christian and Hicks have had contact throughout the years through various business and social relationships. Tr. 2172-80. Christian testified that Hicks was well respected in the broadcast community in Michigan and was viewed as a responsible

broadcaster who was not out to "beat the system or cheat the system." Tr. 2181. Based on his experience with Hicks, Christian believes him to be trustworthy and a man of integrity who would not be predisposed to mislead the Commission. Tr. 2182.

115. Richard H. Harris ("Harris") also testified as a character witness on behalf of Hicks. Harris is the former president and chairman of Group W, Westinghouse Broadcasting's radio station group. Tr. 2195. Harris joined Westinghouse in 1964 and worked there until his retirement in 1991. Tr. 2198. At the time of his retirement, Group W owned 21 radio stations. Tr. 2199.

116. Harris has known Hicks for between 12 and 15 years, primarily through industry organizations to which they both belonged, such as the National Association of Broadcasters ("NAB"). Tr. 2204-6. In approximately 1990, Harris and Hicks served on a committee that worked with a group of European broadcasters to develop a trade conference in Switzerland. Tr. 2204-5. Harris also invited Hicks to serve on the Radio Music Licensing Committee, on which they served together from the late 1980s through 1997, and he appointed Hicks to be the vice chair of the Committee in the early 1990s. Tr. 2206, 2209-11. Harris testified that, throughout the period he has known Hicks, he found Hicks to be "very honest," "candid and forthcoming," and not the type of person who would mislead the Commission. Tr. 2212-3.

117. Henry L. ("Jeff") Baumann ("Baumann") testified as a character witness on behalf of Dille. At present, Baumann is the Executive Vice President for Law and Regulatory Policy at the NAB. Tr. 2356. Previously, Baumann held various jobs at the Commission, ultimately rising to the position of Deputy Chief of the Broadcast (later, Mass Media) Bureau before joining the NAB in 1984. Tr. 2352-6.

118. Baumann first met Dille in 1982, when Dille attended an NAB board meeting after having been elected to serve as a board member. Tr. 2360. Subsequently, Baumann had

contact with Dille through the NAB, when Baumann served as Senior Vice President and General Counsel and Dille served as first a board member and later as chairman (1985-6) of the NAB radio board. Additional contacts have occurred through Dille's work on an NAB committee and return to the NAB board in 1997. Tr. 2362. Baumann developed his high regard for Dille largely as a consequence of Dille's role in the 1986 merger between the NAB and the National Radio Broadcasters Association ("NRBA"). In Baumann's view, Dille was instrumental in convincing broadcasters and the leadership of both groups that a merger was the best way to advance the mutual agendas of the two organizations. According to Baumann, the merger occurred in large part because the broadcasters in both the NAB and the NRBA respected Dille's integrity. Tr. 2365-8.

119. Baumann testified that despite numerous requests for him to testify on people's behalf throughout his years at the Commission and at the NAB, he has never vouched for anyone's character other than Dille in an FCC proceeding. Indeed, Baumann felt so strongly about Dille's integrity that he made an exception to a rule he instituted at the NAB that no NAB personnel may testify voluntarily in any court or administrative proceeding. Tr. 2371. As a consequence of his contacts with Dille, Baumann has the highest regard for Dille's integrity. Tr. 2369-70.

III. Conclusions of Law

1. The *OSC* calls for resolution of interrelated issues involving representations made to the Commission by Hicks/Indiana and by Dille in connection with the acquisition of the license for WRBR(FM), South Bend, Indiana, and the control of that station. The *OSC* specified the issues because the record then before the Commission raised substantial and material questions of fact with respect to the truthfulness of those representations. Specifically, it appeared that Hicks/Indiana sought to conceal from the Commission the existence of an understanding regarding the future ownership of WRBR(FM). It also appeared that Hicks/Indiana and Dille sought to conceal from the Commission the role Dille was going to play in the financing of the purchase of WRBR(FM) by Hicks/Indiana and that station's operation by Pathfinder once Hicks/Indiana became licensee. The ascribed motive for the questionable representations was Dille's apparent desire to purchase and control WRBR(FM) notwithstanding the existence of the newspaper-radio cross-ownership rule which served to bar his ownership and control absent a waiver. However, after considering all the evidence, including the demeanor of the various witnesses, it is concluded that while a material omission occurred in the statement which was signed by Dille and which was submitted as an amendment to the Booth American - Hicks/Indiana assignment application, that omission did not happen because of deceit. Rather, the omission occurred because Dille mistakenly concluded, based on an earlier conversation with counsel, that the information he did not provide was not decisionally significant to the Commission. Accordingly, it is not recommended that the license for either WRBR(FM) or WBYT(FM) be revoked; rather, a forfeiture should be imposed against Pathfinder. Moreover, it is concluded that Pathfinder has

exercised and continues to have the ability to exercise *de facto* control over WRBR(FM), and, thus, Pathfinder and Hicks/Indiana have violated Section 310 of the Act, and Pathfinder has violated Section 73.3555(d)(2) of the Commission's Rules. Accordingly, it is further recommended that appropriate forfeitures be imposed upon both licensees and that the licensees be required to demonstrate compliance with applicable Commission rules.

A. Misrepresentation/Lack of Candor

2. Issue 1 seeks to determine whether Hicks/Indiana misrepresented facts and/or lacked candor in its application to acquire the license for Station WRBR(FM) in violation of Sections 73.1015 and/or 73.3514 of the Commission's Rules. Specifically, the issue concerns representations made to the Commission with regard to the station's present or future ownership or control. Issue 4 seeks to determine whether John Dille III misrepresented facts and/or lacked candor in the application of Hicks/Indiana to acquire WRBR(FM).

3. Misrepresentation is a false statement of fact made with an intent to deceive. *Fox River Broadcasting, Inc.*, 93 FCC 2d at 129. Lack of candor involves concealment, evasion or some other failure to be fully informative, also with an intent to deceive. *Id.* Intent to deceive is a "necessary and essential element" of misrepresentation. *See Swan Creek Communications, Inc. v. FCC*, 39 F.3d 1217 (D.C. Cir. 1994). Such intent may be found from the false statement of fact, coupled with proof that the party making it had knowledge of its falsity. *See David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253, 1260 (D.C. Cir. 1991). Intent may also be inferred from motive. *See Joseph Bahr*, 10 FCC Rcd 32, 33 (Rev. Bd. 1994). The duty of candor requires an applicant before the FCC to be "fully forthcoming as to all facts and information relevant" to its application. *Swan Creek*, 39 F.3d at 1222.

Relevant information is defined as information that may be of "decisional significance." *RKO General Inc. v. FCC*, 670 F.2d 215, 229 (D.C. Cir. 1981), *cert denied*, 456 U.S. 927 and 457 U.S. 1119 (1982). Even when an intent to deceive does not exist, however, the Commission can impose a forfeiture for the willful omission of material facts pursuant to Section 73.1015 of the Commission's Rules. *See Abacus Broadcasting Corp.*, 8 FCC Rcd 5110 (Rev. Bd. 1993).

i. Hicks/Indiana

4. The findings establish and it is therefore concluded that Hicks/Indiana accurately set forth its ownership structure which existed throughout the pendency of the application to acquire WRBR(FM). In this regard, the representations in the application were fully in accord with the documents which ultimately gave birth to Hicks/Indiana. Specifically, David Hicks was and remains the single majority owner of Hicks/Indiana, while the three Dille children were and remain the minority owners of that entity. (Findings, ¶¶ 39, 61-3, 66)

5. Although the findings regarding future ownership of Hicks/Indiana are not as clear cut, it is concluded that Hicks/Indiana did not misrepresent facts or lack candor. Question 15 of the Booth American - Hicks/Indiana assignment application inquired whether there were "any documents, instruments, contracts or understandings relating to ownership or future ownership rights...." The findings show that there were no documents, instruments or contracts then in existence. In this regard, the findings further show that the Operating Agreement, which gave the Dille children the right to "call" Hicks' interest at any time, and the Side Letter, which gave Hicks the right to "put" all of his interest to the Dille children were not finalized until the end of March 1994, several weeks after the assignment application

had been granted. (Findings, ¶¶ 59-60)

6. The findings further indicate that, throughout the pendency of the application, only discussions had occurred between Hicks and Brown on the one hand and Dille and Robert Watson on behalf of the Dille children as to whether Hicks would sell his interest in Hicks/Indiana to the Dille children. In this regard, from his first meeting with Hicks in July 1993 through his joint meeting with Hicks and Eric Brown, Hicks' counsel, Dille repeatedly expressed not only his desire that his children hold minority interests but that they have the right to acquire Hicks' interest when and if such became possible. (Findings, ¶¶ 16, 21, 29, 31) Neither Hicks nor Brown ever rejected such overtures or suggested that they were unacceptable. Indeed, in considering Hicks' exit possibilities, the only option ever discussed was acquisition of Hicks' interest by the Dille children. (Findings, ¶ 31)

7. However, until the mechanics of transmitting Hicks' interest in Hicks/Indiana to the Dille children were resolved - which did not occur until after the application had been granted - only discussions concerning the matter had actually occurred. Thus, even though Dille asserted to Booth as early as August 15, 1993, that his children "would have an arrangement-option-agreement to purchase from Hicks his shares when and if that became possible," Hicks had not yet assented to such an arrangement. Indeed, it appears that Dille's assertion, which was made without Hicks' knowledge, was gratuitous and designed primarily to persuade Booth that Hicks was ready to step into Pathfinder's shoes and buy WRBR(FM). (Findings, ¶¶ 18-9) That such ultimately happened does not prove the existence of an understanding, especially when one considers that Brown had an independent role on behalf of Hicks during subsequent negotiations with Booth American. (Findings, ¶ 33)

8. Admittedly, a more troublesome question is raised by Sackley's testimony. In this regard, Sackley, then Hicks' business partner, understood by late September 1993 that Hicks' possible acquisition of WRBR(FM) involved a "planned subsequent transfer to a third party." (Findings, ¶ 26) Obviously, Sackley could not have obtained this understanding absent statements regarding this topic from Hicks and/or Dille. However, Sackley's testimony does not inevitably lead to the conclusion that an understanding between Hicks and Dille regarding future ownership actually existed. Moreover, even if one credited only Sackley's recollection of the discussion that occurred during the January 1994 Crystal board meeting, it shows only that Hicks and Brown viewed matters as unsettled because there was no written agreement concerning future ownership rights. (Findings, ¶ 46)

9. Consistent with the view attributed to Hicks and Brown by Sackley, the record reflects that, while the application was pending, there was no agreement as to how and at what price such a planned transfer was to occur. Indeed, Dille's first concrete proposal regarding his children's future ownership rights - a proposal which Hicks did not accept - was not made to Hicks until one week after the application was granted. (Findings, ¶¶ 58-9) While Hicks' counteroffer involved only a change in price, that change was not so insignificant as to be meaningless. Moreover, the ultimate terms agreed to by Hicks and Dille (on behalf of his children) cannot be viewed as unreasonable considering the circumstances then existing in the broadcast industry. (Findings, ¶¶ 58-9) Finally, by virtue of the put provision in the Side Letter, Hicks tacitly promised to be available for at least three years before he might choose to exit as an owner of WRBR(FM). (Findings, ¶ 60) In sum, while the issue of future ownership by the Dille children was never a point of contention between

Hicks and Dille, it also never rose to the level of an actual understanding. Thus, Hicks was not obligated to report his discussions with Dille concerning future ownership, and his decision not to report them should not be viewed as arising from deceit.

10. With respect to the issue of providing information relative to the control of WRBR(FM), however, Hicks/Indiana did not disclose during the pendency of the application the extent to which Pathfinder would be involved in the affairs of WRBR(FM). Nevertheless, in light of the sequence of events, it is concluded that Hicks/Indiana did not violate Sections 73.1015 or 73.3514 of the Commission's Rules; rather, it appears that Hicks/Indiana may have violated Section 1.65 of the Commission's Rules. In this regard, Hicks/Indiana accurately responded to the staff's query regarding the proposed roles of Dille and his father and answered each application question accurately. However, following the Watson/Campbell discussion, Hicks/Indiana did not inform the Commission that Pathfinder's role with respect to WRBR(FM) was going to be more than that set forth in the JSA. Thus, although it appears that Hicks/Indiana may have violated Section 1.65 of the rules, it is not recommended that any sanction be imposed. First, the findings reflect that any such violation was not caused by deceit. Second, this proceeding does not include an issue as to whether a violation of Section 1.65 of the rules occurred.

11. In its application, Hicks/Indiana reported that Booth American and Pathfinder were parties to a JSA and that Booth American's interests therein would be assigned to Hicks/Indiana. (Findings, ¶ 39) Nothing else appears relative to Pathfinder's proposed role in the operation of WRBR(FM). Thus, the only impression given in the application regarding Pathfinder's role was that it would be limited to that specified in the JSA, a type of agreement

that the Commission explicitly permitted. (Findings, ¶ 5) That impression was further bolstered by the submission of the Dille statement, which clearly and unequivocally stated that Dille and his father, Pathfinder's and Truth's principal shareholders, respectively, would not be involved in either the financing or the day-to-day operations of WRBR(FM). (Findings, ¶¶ 50-5)

12. However, shortly thereafter, in early March 1994, Hicks, Watson, Dille and Campbell had discussed and/or assented to a seven point plan which gave Pathfinder significant additional influence with respect to the day-to-day operation of WRBR(FM) to that already accorded by the JSA in the areas of personnel and finances. With regard to personnel, Pathfinder employee Kline, who was already general manager of WLTA(FM), would also become general manager of WRBR(FM). Second, all employees of Hicks/Indiana would be on Pathfinder's payroll and subject to Pathfinder's personnel policies. With regard to finances, Pathfinder would do all of Hicks/Indiana's accounting, and Pathfinder's checking account would serve as the repository for all Hicks/Indiana funds and the source of all Hicks/Indiana checks. (Findings, ¶¶ 62-3) All such checks would be prepared and signed by Pathfinder personnel. (Findings, ¶¶ 64, 91, 93-4) While the arrangement also had several built-in safeguards that were designed to keep Hicks in charge of WRBR(FM), the totality of the provisions gave Pathfinder an opportunity to control WRBR(FM) -- an opportunity of which it took advantage, as more fully discussed, *infra*. Notwithstanding Hicks' and Campbell's knowledge of the arrangement, the Hicks/Indiana application was not updated to report Pathfinder's additional proposed role in the operation of WRBR(FM). (Findings, ¶¶ 50-5, 62)